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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RICHARD H. AUSTIN, Michigan Secretary of State, and FRANK J. KELLEY, Michigan Attorney General,
Appellants,

v.

MICHIGAN STATE CHAMBER OF COMMERCE, a non-profit Michigan corporation,
Appellee.

On Appeal from the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR COMMON CAUSE AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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Common Cause respectfully submits this brief as *amicus curiae* in support of the Jurisdictional Statement filed by appellants, Richard H. Austin, Michigan Secretary of State, and Frank J. Kelley, Michigan Attorney General, seeking review of the decision of the United States Court of Appeals for the Sixth Circuit. Counsel for the petitioners and counsel for the respondents have consented to the filing of this brief in letters filed with the Clerk of the Court.

INTEREST OF AMICUS CURIAE

Common Cause is a nonprofit, nonpartisan organization with approximately 270,000 members. One of its central purposes is to further honest and responsible government, accountable to the voters who elect it. Common Cause has participated actively in litigation seeking to protect the integrity of the electoral process. It has filed briefs as party or *amicus curiae* in several previous cases before this Court concerning the constitutionality and implementation of the federal election laws,[1] including *FEC v. Massachusetts Citizens for Life, Inc.* (*"MCFL"*), 479 U.S. 238 (1986), the decision whose interpretation is at issue in the present case. Common Cause believes that this case raises important issues that go to the heart of legislative prohibitions on corporate spending in election campaigns.

ARGUMENT

I. The Decision Below Misconstrues This Court's Opinion in *FEC v. Massachusetts Citizens for Life* and Conflicts With a Recent Decision by Another Federal Court.

This Court should note probable jurisdiction in this case because it presents a substantial federal question and conflicts with another lower court decision. The public interest requires this question to be resolved before confusion or misapprehension about the law irretrievably affects future elections.

As the Jurisdictional Statement demonstrates, the United States Court of Appeals for the Sixth Circuit

[1] *See, e.g., FEC v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985); *Common Cause v. Schmitt*, 512 F. Supp. 489 (D.D.C. 1980) (3-judge court), *aff'd by equally divided court*, 455 U.S. 129 (1982); *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981); *Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280 (S.D.N.Y.) (3-judge court), *const. qns. answered*, 616 F.2d 1 (2d Cir.) (en banc), *aff'd mem.*, 445 U.S. 955 (1980); *Buckley v. Valeo*, 424 U.S. 1 (1976).

misread a directly applicable decision of this Court, *Federal Election Commission v. Massachusetts Citizens for Life, Inc.* (*"MCFL"*), 479 U.S. 238 (1986). In the *MCFL* case, this Court identified the evils that Congress sought to prevent when it prohibited corporate expenditures in federal election campaigns. First, the Court noted Congress' concern that the integrity of the political process would be threatened by the "corrosive influence of concentrated corporate wealth."[2] Second, the Court observed that the statute seeks to "prevent[] an organization from using an individual's money for purposes that the individual may not support."[3] Third, the Court pointed to the danger that a corporate entity might be used as a conduit for spending by business corporations.[4] After discussing these statutory purposes, Justice Brennan wrote, "We acknowledge the legitimacy of Congress' concern that organizations that amass great wealth in the economic marketplace not gain unfair advantage in the political marketplace."[5]

The Court then carefully tailored a narrow exception for independent expenditures by nonprofit corporations whose activities did not implicate any of Congress' legitimate concerns. It held that Congress could not constitutionally prohibit genuinely independent expenditures by incorporated ideological groups having no financial ties with profit-making businesses. But one of the three features of MCFL which the Court deemed "essential to [its] holding" was the fact that MCFL was "not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities. This prevents such corporations from serving as

[2] *Id.* at 257.

[3] *Id.* at 260.

[4] *Id.* at 262.

[5] *Id.* at 263.

conduits for the type of direct spending that creates a threat to the political marketplace." *Id.* at 264.

This case, like *MCFL*, involves independent expenditures by a nonprofit corporation. The two cases, however, are fundamentally different. In contrast with MCFL, the Michigan State Chamber of Commerce was established by business corporations; 75 percent of its dues paying members are corporations. Therefore, it serves as a conduit for business corporate spending in the political marketplace. Nevertheless, the court of appeals held that the State Chamber of Commerce qualified for the same treatment as MCFL, and struck down Michigan's statutory prohibition on corporate independent expenditures as applied to the State Chamber. The Sixth Circuit's opinion thus ignored one of the three essential criteria set forth by this Court in the *MCFL* case.

In contrast, in April 1988, a federal district court correctly applied this Court's *MCFL* decision to reach a contrary conclusion in a similar case.[6] The United States Defense Committee (USDC), a tax-exempt nonprofit corporation which lobbies on national defense and foreign policy issues, receives contributions from business corporations as well as individuals and partnerships. On this basis, the district court concluded that USDC did not qualify for the exemption from § 441b established in the *MCFL* case.[7] Although the court of appeals reversed the district court's decision for lack of ripeness, the case demonstrates the substantial likelihood of conflicting decisions in the federal courts on the scope of the *MCFL* exception.

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[6] *United States Defense Comm. v. FEC*, No. 84-CV-450 (N.D.N.Y. Apr. 1, 1988), *vacated and remanded on other grounds*, 861 F.2d 765 (2d Cir. 1988).

[7] *See United States Defense Comm. v. FEC*, 861 F.2d 765, 766 (2d Cir. 1988).

II. The Court of Appeals' Reasoning Would Drastically Undermine Federal and State Laws Designed To Prevent the Abuses Stemming From Corporate Spending in Election Campaigns.

If allowed to stand, the decision below would prevent effective enforcement of laws prohibiting corporate expenditures in connection with election campaigns, which have been enacted by Congress and approximately twenty state legislatures.[8] Business corporations relying on the Sixth Circuit's decision will use the device of intermediary nonprofit corporations to spend wealth amassed for business purposes in election campaigns, thus creating the very dangers of corruption and the appearance of corruption that the statutes were designed to prevent.

If the Michigan State Chamber of Commerce qualifies for the *MCFL* exception, then that exception extends to a very broad category of incorporated entities. The State Chamber is a multipurpose organization whose purposes include mutual assistance as well as the propagation of ideas. Its objectives include not only encouraging the "preservation of and enhancement of the American system of private enterprise" and informing the government of the views of the business community,[9] but also promoting "the economic development of the State of Michigan," keeping members informed about laws and regulations affecting their interests, furnishing technical and educational materials to members, and encouraging the observance of ethical business practices.[10] The organiza-

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[8] *See* Juris. Statement 16 n.13.

[9] One of the Chamber's publications states, "As Michigan's leading business advocate, the State Chamber actively speaks out on legislative, political, legal, economic and social issues that affect the business community." Michigan State Chamber of Commerce, *1985-86 Michigan Directory* 1 (1985) (Plaintiff's Trial Exhibit No. 3).

[10] By-Laws of the Michigan State Chamber of Commerce (revised April 24, 1980) (Defendants' Exhibit No. 7 at the deposition of Robert S. LaBrant); *see* Juris. Statement App. 3a.

tion "provides a wide variety of membership services—including regular and special publications, legislative briefings, group insurance, a business hot-line, and seminars—designed to help members operate effectively, profitably and responsibly." [11]

In these respects, the State Chamber of Commerce is indistinguishable from countless other trade associations, whether their membership encompasses one or many industries. Typically, one of the principal purposes of a trade association is to lobby for its members' business interests.[12] It is difficult to imagine any policy on which a lobbying group working to promote the economic interests of business corporations could not phrase its arguments largely in political or ideological terms. For example, the United States Chamber of Commerce emphasizes "free-market principles" and the "free enterprise system." [13] Privately-owned electrical utilities espouse the virtues of free enterprise; oil producers urge various measures that would increase the nation's energy independence while increasing the price of domestically produced oil; publishers and broadcasters have an interest in promoting freedom of speech; defense contractors' groups assert that national security requires increased defense spending.[14]

[11] *1985-86 Michigan Directory*, *supra* note 9, at 1.

[12] *National Trade and Professional Associations of the United States* 5, 8 (J. Russell 24th ed. 1989).

[13] *See* U.S. Chamber of Commerce, *We Believe in America and the Free Enterprise System That Made It Great* 2, 3, 12 (1984); *id.* at 2 ("If your firm is to meet the challenge of those who would handcuff free enterprise and claim more and more of your hard-earned profits, you need an ally that will fight business' fight as only the U.S. Chamber of Commerce can.").

[14] Such groups, of course, are free to communicate their views on policy issues in various ways; at issue in this case is whether they may be prohibited from making expenditures that expressly advocate the election or defeat of particular candidates for public office. *See MCFL*, 479 U.S. at 259 n.12.

Accordingly, no workable distinction can be drawn between primarily ideological entities which receive money from business corporations, and those which are primarily designed to promote business interests.[15] Instead of imposing such a time-consuming and ultimately futile task upon campaign finance enforcement agencies and state and federal courts, this Court should reaffirm the rule established in *MCFL* that independent expenditures in election campaigns may be made only by nonprofit corporations which do not receive any funds from business corporations. This prophylactic rule provides clarity and certainty in an area that would otherwise be vexed by evasions, circumventions and close questions of degree.

The flow of business corporation money through the trade association loophole opened by the Sixth Circuit's opinion is potentially massive. The Michigan State Chamber of Commerce had dues income in 1984-85 of $1.85 million. Each of the fifty states has a state chamber of commerce; these groups are affiliated with the United States Chamber of Commerce, a financially powerful nonprofit corporation whose members include

[15] *See Constitution of the National Association of Manufacturers of the United States of America*, art. II, § 1 (rev. 1985) ("The general objects and purposes for which the NAM is formed are the promotion of the industrial interests of the United States, the fostering of the domestic and foreign commerce of the United States, the advancement of private markets and sound economic growth, the promotion of a strong defense posture, the betterment of relations between employer and employees, the protection of the individual liberty and rights of the employer and employees, and the dissemination of information with respect to the principles of individual liberty and ownership of property. More particularly, the objects and purposes of said corporation are to establish and maintain a mutual and cooperative organization of American manufacturers for the fostering of their trade, business and financial interests, to reform abuses relative thereto, to secure freedom from unlawful and unjust exactions, to support or oppose legislation depending on its impact on these principles and promote a more enlarged and friendly intercourse among manufacturers.").

business corporations as well as individuals and trade associations. Virtually every industry has one or several trade associations, which are typically nonprofit corporations with corporate members. At least 750 trade associations with annual budgets exceeding $1 million have corporate members whose interests may be affected by governmental policies; of these, more than 200 have annual budgets exceeding $5 million.[16]

If the loophole remains, business corporations are virtually certain to increase the amounts of corporate money flowing to trade associations and expended for campaign purposes.[17] Currently, business corporations and incorporated trade associations must create "political action committees" (PACs) in order to participate in election campaigns at the federal level and in states which prohibit direct corporate involvement; PAC fundraising activities are subject to substantial restrictions.[18] Nearly two thousand business corporations and hundreds of trade associations have established affiliated PACs. In

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[16] Analysis of lists published in *National Trade and Professional Associations of the United States* 411-15, *supra* note 12.

[17] Trade associations and business leagues, exempted from federal income tax under 26 U.S.C. § 501(c)(6) (1982), are not required to refrain from political activity in order to preserve their tax-exempt status. *See* T. Geer, *Tax Management, Estates, Gifts, and Trusts: Exempt Organizations—Exemption Requirements* A-15 (1986).

[18] Under federal law, a PAC's administrative and fundraising expenses may be paid by its parent, 2 U.S.C. § 441b(b)(2)(C) (1982), but the PAC may solicit contributions only from a restricted class of stockholders and executive or administrative personnel of specified corporations. A PAC sponsored by a corporation may solicit the stockholders and executive or administrative personnel of its parent corporation. *Id.* § 441b(b)(4)(A)(i). The PAC of a trade association may solicit the stockholders and executive or administrative personnel of any member corporation which has given its approval, but a corporation may provide such approval to only one trade association per year. *Id.* § 441b(b)(4)(D). Individual contributions to a PAC are limited to $5000 per year. *Id.* § 441a(a)(1)(C).

the first 18 months of the 1987-88 election cycle, corporate PACs spent more than $58 million, including $36 million in contributions to candidates.[19] The size of the corporate PAC sector today gives proof of the enormous interest of business corporations in attempting to influence the political process. The loophole created by the Sixth Circuit's decision can be expected to attract even greater sums directly from corporate treasuries amassed for business purposes.

Unleashing the accumulated financial power of business corporations upon the political process, through nonprofit corporate entities, would thus create precisely the evils that federal and state legislators sought to prevent when they prohibited corporate election spending. First, such spending would create "the potential for unfair deployment of wealth for political purposes"[20]—no less unfair merely because it is channeled through an intermediary that can be controlled by business corporations. Like corporate treasury funds, trade association dues paid by member corporations are a function of business corporations' success in the economic marketplace rather than their popularity in the political marketplace.[21] Second, corporations might use their shareholders' money for political purposes that some shareholders do not sup-

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[19] Federal Election Commission, Press Release, Sept. 8, 1988, at 2. The figure of $58 million does not include spending by trade association PACs. The largest trade association PACs include the Realtors Political Action Committee (disbursements of $2.7 million in the first 18 months of 1987-88); Build Political Action Committee of the National Association of Home Builders ($1.2 million); Dealers Election Action Committee of the National Automobile Dealers Association ($950,000); California Real Estate PAC ($874,000); and the American Bankers Association BankPac ($832,000). *Id.* at 23.

[20] *See MCFL*, 479 U.S. at 259.

[21] *See id.* at 258-59.

port;[22] the shareholders' dissent is not magically eliminated by the expedient of funneling the money through two corporations instead of one.

Congress was well aware of the potential use of intermediary entities to circumvent the ban on corporate election spending, and the legislative history of the federal statute makes clear that Congress intended to ban indirect as well as direct corporate financial involvement in campaigns. During floor debate on the Taft-Hartley Act in 1947, Senator Robert Taft was asked whether the National Association of Manufacturers or the United States Chamber of Commerce would be prohibited, "out of funds contributed by corporations into the general fund of the association, from buying newspaper space to advocate or oppose a candidate for public office. . . ." Senator Taft responded, "Of course, if the Chamber of Commerce were a corporation, as I think it is, it would be clearly illegal."[23]

Such legislative judgments regarding the scope of the prohibition necessary to prevent political use of money amassed for business purposes, made by Congress and twenty state legislatures, are entitled to substantial deference from the courts.[24]

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[22] *Id.* at 258; *FEC v. National Right to Work Comm.*, 459 U.S. 197, 208 (1982).

[23] 93 Cong. Rec. 6438 (1947).

[24] *See FEC v. National Right to Work Comm.*, 459 U.S. at 210 ("we accept Congress' judgment that it is the potential for such influence that demands regulation. Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.").

CONCLUSION

For the foregoing reasons, Common Cause believes that the decision of the United States Court of Appeals for the Sixth Circuit should be reversed. Accordingly, the Court should note probable jurisdiction in this case.

Respectfully submitted,

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